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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1325

CLYDE H. HALE, JR.,
Petitioner,

VERSUS

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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April, 1969

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above cause on the 21st day of January, 1969. Petition for rehearing was denied on the 17th day of March, 1969.

OPINION BELOW

The opinion of the court below is not yet known to be reported, but is appended hereto in Appendix A.

JURISDICTION

The jurisdiction of the Supreme Court of the United States to review by Writ of Certiorari the order of the United States Court of Appeals is believed to be conferred

by 48 U. S. Statutes, 926, and which states, in its pertinent part:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods (a) by Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

QUESTIONS PRESENTED

This Petition presents the following questions for review:

1. Is it a violation of the guarantee against self-incrimination to obtain a criminal conviction by reading into the record a confession obtained from the defendant at a previous *ex parte* proceeding in which he was cited for contempt, when at that previous *ex parte* proceeding he was under bond, unapprised that his testimony could or would later be used for a criminal prosecution and when at the time he faced the three alternatives of:

   a) remaining silent and being held in contempt;

   b) speaking the truth and incriminating himself; or

   c) committing perjury to exonerate himself?

2. Is a Certified Shorthand Reporter a competent officer or tribunal within the meaning of the perjury statute (78 Stat. 995) when that reporter completes, falsely certifies and defectively files a deposition in gross and flagrant disregard and violation of the Federal Rules of Civil Procedure?

3. Do the Federal Rules of Civil Procedure have such authority and persuasion of law as to require that a federal

officer or tribunal, when acting in judicial matters, must comply with them in order to perfect their competence within the meaning of the perjury statute? (78 Stat. 995).

4. Where both correction and recantation are recognized as elements tending to disprove the intent to have committed perjury, is it a denial of due process of law for a trial court to deny one accused of perjury the right to put on evidence as to his acts of correction and recantation?

STATEMENT OF CASE

CLYDE H. HALE, JR., was indicted by a Federal Grand Jury on the 18th day of September, 1967, on a one (1) count indictment, charging that he had taken an oath for the purpose of giving his oral deposition in a civil case then pending in the United States District Court for the Western District of Oklahoma, it being Civil Case No. 66-126. The indictment further charged that he had testified untruthfully as to the whereabouts of $38,000.00, which he stated to be in a safe deposit box at the May Avenue Bank in Oklahoma City, Oklahoma.

The series of proceedings which culminated in this conviction consisted of a civil suit (Civil Case No. 66-126), a Contempt Citation hearing which was ancillary to the civil suit, and the perjury trial itself.

1) Civil Suit

A certain Luis Miranda Casanas and Victor L. Alvarez filed Civil Suit No. 66-126 as plaintiffs in the United States District Court for the Western District of Oklahoma on March, 1966, naming R & K Enterprises, Inc., and Carl

E. Rogers, Jaymes E. Kelly and Clyde H. Hale, Jr., Trustee, defendants. This action arose out of transactions and contracts which were executed in San Juan, Puerto Rico, and the prayer in the suit sought a total recovery in excess of one million dollars.

At the time this action was filed, attorney for the plaintiff, Mr. John Joseph Snider of the law firm of Fellers, Snider and Baggett, filed notice with the court to take the depositions of defendants, Rogers, Kelley and Hale. Subpoenas were issued and notices given for defendant Hale to appear in the office of Hayden M. Addington, a United States District Court Reporter, for the purpose of taking his oral deposition.

On the 13th day of April, 1966, pursuant to the notice and subpoena, Mr. Hale appeared at the office of Hayden M. Addington, whereupon Mrs. Nona M. Cline, a Certified Court Reporter for the State of Oklahoma, was present to administer the oath and take the deposition.

At the time of the giving of this alleged deposition Mr. Hale specifically reserved the right to read and sign the deposiiton after its transcription (Plaintiff's Ex. 6—Deposition page 40). Mr. Hale stated in his deposition that he was an attorney practicing law in Oklahoma City, Oklahoma, and that he represented R & K Enterprises, Inc., Carl E. Rogers and Jaymes E. Kelley. In other words, the relationship between them was that of attorney and client. Mr. Hale further stated in his deposition that in connection with matters and transactions leading up to Civil Case No. 66-126 that he had received $38,000.00 which was to be paid to his clients Rogers and Kelley, but that at the then

present time this $38,000.00 was in his bank box at the May Avenue Bank in Oklahoma City, Oklahoma. At the time of giving this statement Mr. Hale did so in the good faith but mistaken belief that his clients had, at that time, caused the money to be bank-wired to the May Avenue Bank for deposit in his safety depository box.

A significant point is that Mr. Hale was never subsequently accorded the opportunity to read and sign this deposition (Plaintiff's Ex. 6—Deposition page 40).

The pertinent portions of the deposition are appended hereto as Appendix B.

On May 5, 1966, the Honorable Fred Daugherty entered an order instructing Mr. Hale to hold the $38,000.00 until the further order of the court. At this time his clients, Rogers and Kelley, had not succeeded in forwarding to him the $38,000.00 for deposit, but Mr. Hale did not consider this situation too serious since his clients had performed faithfully in such matters previously and also since the deposition had not been filed, knowing that a Motion to Suppress the deposition could be filed after the filing of the deposition.

On the 21st day of October, 1966, however, Mr. Hale sought the legal counsel of Mr. James W. George, another Oklahoma City attorney, relative to his not having possession of the $38,000.00. On October 24, 1966, Mr. George contacted Mr. Snider, attorney for the plaintiffs, and informed Mr. Snider that Mr. Hale did not have the $38,000.00. Whereupon, *from this time forward it was well known to the plaintiffs, the attorneys and the judge in the case that Mr. Hale did not have possession of this money.*

On November 8, 1966, order of default judgment was entered in Civil Case No. 66-126 and this order of judgment included an order to Mr. Hale to pay the money into the Registry of the Court.

On the 14th day of November, 1966, upon the affidavit of Mr. Snider, the Honorable Fred Daugherty issued an order to Mr. Hale to appear before the court on November 23, 1966, and show cause why he should not be punished for contempt for his failure to comply with the provisions of the order of November 8. On November 23, 1966, Mr. Hale appeared in court and posted a bond in the amount of $5,000.00 to guarantee his appearance at the contempt hearing.

On the 25th and 26th of January, 1967, the contempt trial of Clyde H. Hale, Jr., was held. At this trial it was found that Mr. Hale was not guilty of *either* civil *or* criminal contempt, and on February 28, 1967, a final order of dismissal of the contempt charge was filed in open court.

2) Contempt Hearing

At the contempt hearing of Clyde H. Hale, Jr., the only issue before the court was whether Mr. Hale's failure to pay the money into the Court's Register was contemptuous. After the evidence revealed that the accused did not have the $38,000.00 and after learning further that counsel for the plaintiff in Civil Case No. 66-126 knew even before the court issued its order to Mr. Hale that he did not have the money, the trial judge had no choice but to dismiss the contempt citation.

After this determination, and even knowing that the accused was then under bond, Judge Daugherty launched

into an inquisitorial type proceeding which, if it must properly be categorized legally, can be said only to have been a proceeding in aid of execution. The entire demeanor of this hearing was one to determine the whereabouts of the $38,000.00. Why Mr. Hale did not have it! What Mr. Hale did with it! Why Mr. Hale said that it was in his bank box when it was not!

The pertinent portion of the transcript of record from Civil Case No. 66-126 are appended hereto as Appendix C.

Although the alleged and purported deposition of Mr. Hale was never read and signed by him when he specifically reserved the right to do so, and although the deposition was not properly filed with the Clerk of the Court as is required by the rules of Federal Procedure, and although notice of its filing was never given to Mr. Hale; and although the deposition was never introduced into evidence in the Civil Case No. 66-126, *nevertheless* the alleged and purported deposition became the basis for a federal perjury conviction. IT IS ALSO TO BE OBSERVED THAT THE CERTIFICATE OF NONA M. CLINE INCLUDED AT THE END OF THIS PURPORTED DEPOSITION CERTIFIES THAT MR. HALE SIGNED THE DEPOSITION. WHEN IN TRUTH THE LINE RESERVED FOR HIS SIGNATURE IS BLANK EVEN TO THIS VERY DATE (Appendix B—Deposition, pages 40 and 50). Furthermore, the District Attorney and the Court of Appeals have even yet omitted to explain Mrs. Cline's certification that Mr. Hale affixed his signature to the deposition. This plain and obvious false certificate of the "so-called" Official Court Reporter given under oath was successfully kept from the Grand Jury and the trial judge,

which false certificate of the so-called Court Reporter is and does constitute a necessary certificate if the deposition could *rise* to the *dignity* of a deposition taken and transcribed under the laws of the United States, to-wit: the Federal Rules of Civil Procedure.

3) Perjury Trial Proceedings

At the beginning of the perjury trial, counsel for the appellant filed Motions to Suppress any and all matters that were before Judge Daugherty at the contempt hearing and also to quash the deposition. Nevertheless, the perjury trial of Clyde H. Hale, Jr., was opened with the testimony of Mrs. Nona M. Cline, a Notary Public and Certified Shorthand Reporter for the State of Oklahoma. Although the purported deposition was never introduced into evidence, Mrs. Cline testified as to certain portions of its contents. This deposition was taken on the 13th day of April, 1966, and at no time did Mr. Hale waive his right to read the deposition after the transcription or the right to affix his signature thereto. At no time thereafter, even to the time of his perjury trial, was Mr. Hale afforded the opportunity to read the deposition. Additionally, this deposition was not filed with the Clerk of the District Court for several weeks after its taking and transcription and at no time was notice of its filing ever given to the accused. Therefore, this deposition was legally incompetent to be admitted into evidence.

The Government Prosecutor then introduced the testimonies of Mr. George N. Felts, Vice-President of the May Avenue Bank, Mr. Jaymes E. Kelley, a convicted felon, and Mr. Carl E. Rogers, a former partner of Mr. Kelley,

and through this testimony proceeded to prove that Mr. Hale had a personal interest in the $38,000.00, that he was a partner to Rogers and Kelley, and that he had some sinister and evil motive to conceal the whereabouts of the $38,000.00—all of which was irrelevant and immaterial to the issue of perjury and not an element of the offense. To all of which the accused objected.

The only purpose and the only result that this type testimony could have had was to have prejudiced Mr. Hale to the jury, since the only real issue was the truthfulness of the deposition, if it were a deposition, and not motives behind Mr. Hale's actions.

Also introduced at the perjury trial was the testimony of Mr. R. Lee Cook (Appendix D, Tr. 167), the Certified Court Reporter who took the transcript of trial during Civil Case No. 66-126. Mr. Cook recited, under oath, those portions of the transcript of trial from Civil Case No. 66-126 which constituted self-incriminatory admissions of Mr. Hale, and which he made at the contempt hearing. These admissions were made by Mr. Hale when he was in custody, under bond, unapprised of his constitutional rights, and unapprised of the fact that his admissions could or would later be used as evidence against him. The introduction of this self-incriminatory evidence constituted a gross and flagrant disregard of Mr. Hale's constitutional rights and immunities.

When the accused offered testimony in rebuttal of the Government's evidence-in-chief, the testimony of Mr. James W. George, which was offered to show lack of intent to have committed perjury, was excluded by the trial

judge. Furthermore, the accused was restricted to offering testimony on rebuttal which occurred only on the day of April 13, 1966 (Appendix D, Tr. 251), the day of taking the purported deposition, while the Government Prosecutors had been allowed to offer testimony which took place over a period of seven (7) months before and seven (7) months after the taking of the purported deposition.

These errors permitted incompetent evidence to be admitted and allowed much irrelevant and immaterial testimony to be presented to the jury. This resulted in the conviction of Mr. Hale for perjury when in truth and in fact he should have been acquitted by the trial judge upon discovery that the purported deposition was not in conformity with the Federal Rules of Civil Procedure and had, therefore, never at any time, acquired the status and dignity of a sworn deposition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the Constitution of the United States: AMENDMENT V—CAPITAL CRIMES: DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public anger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

The Federal Rules of Civil Procedure—Rule 28(a):

"WITHIN THE UNITED STATES. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the Court in which the action is pending. A person so appointed has power to administer oaths and take testimony." (As amended Dec. 27, 1946, effective March 19, 1948.)

Federal Rules of Civil Procedure, Rule 29:

"Stipulations Regarding the Taking of Depositions.

"If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions."

Federal Rules of Civil Procedure, Rule 30(e):

"Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition

is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason if any, given therefor; and the deposition may then be used fully as though signed, unless on a motion to suppress under Rule 32(d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part."

Federal Rules of Civil Procedure, Rule 30(f)(3):

"The party taking the deposition shall give prompt notice of its filing to all other parties."

Federal Rules of Civil Procedure, Rule 32—Effect of Errors and Irregularities in Depositions:

"(a) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice."

"(b) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence."

"(d) As to Completion and Return of Depositions. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained."

78 United States Statutes 995 (18 U.S.C. 1621—Perjury generally):

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000.00 or imprisoned not more than five years, or both. This section is applicable whether the statute or subscription is made within or without the United States."

REASONS FOR GRANTING THE WRIT

The Petitioner gives the following reasons why a Writ of Certiorari should issue to the Court of Appeals:

I

THE COURT OF APPEALS HAS DENIED THIS PETITIONER DUE PROCESS OF LAW BY LOOKING PRIMARILY TO THE FACT OF INNOCENCE OR GUILT, AND BY ITS FAILURE TO LOOK TO THE MANNER IN WHICH HIS CONVICTION WAS OBTAINED AND ALSO AS TO WHETHER THE FEDERAL COURTS EVEN HAD JURISDICTION OVER THE CRIME FOR WHICH THE PETITIONER WAS CONVICTED.

The Appellant's conviction was obtained by the use of a purported deposition which contained a patently false and perjurious certification by the officer who took it. The deposition was filed in a Federal case in open and flagrant

violation of a majority of the Federal Rules which govern the taking, perfecting and filing of a deposition. The acts of the officer who took the deposition constituted a complete dereliction of duty, yet both the trial court and this Court of Appeals have found that officer to have been a "competent tribunal" within the meaning of the perjury statute. This "competence" has been bestowed upon the officer by categorizing gross omissions and a false certification as "errors and irregularities" and excusing them by operation of Rule 32 (a) and (b). This is a legal fiction which was invented by the Government's prosecuting attorney and which has been perpetuated by the Federal Courts as a means to erroneously preserve their jurisdiction over the Appellant.

The opinion of the Court constitutes a summary dismissal of substantial issues presented by the Appellant, a most prominent example of which is its total failure to explain why the Appellant was under a $5,000.00 criminal bond if the contempt proceeding was a purely civil matter; another is the Court's view that the Appellant's contention of violation of his constitutional safeguards is "ingenious but without merit" when the testimony complained of was elicited from him when he was in custody of the Court, under bond, and unapprised of his constitutional rights.

The various elements present in the Appellant's contentions justify, if not demand, thorough legal treatment by this Court rather than summary dismissal with cursory comments, and lack of such legal treatments is error and a denial of due process of law.

The Court of Appeals committed further error by failure to diligently inquire into the manner in which this

conviction was obtained and whether the District Court had jurisdiction. This is evident from the final sentence in the Court's opinion wherein it states,

> "furthermore, the element of willfulness in this case under the overwhelming weight of the undisputed evidence including the testimony of appellant in his own defense is so clear and free from doubt that nothing appellant did or could have done subsequent to April 13, 1966 would have overcome it."

Taken at its face value this sentence indicates an inclination of this Court to completely discount even the possibility of correction or recantation by the Appellant and further evinces the inclination of the Court to be so impressed with the fact of guilt that it is blinded to the manner in which this conviction was obtained.

On appeal the question is not merely one of guilt or innocence, but rather one of how the conviction was obtained and whether it comports to the required standard of Federal procedure.

II

THE COURT OF APPEALS COMMITTED ERROR BY MAKING A PATENT MISAPPLICATION OF THE FEDERAL RULES OF CIVIL PROCEDURE IN ORDER TO GIVE COMPETENCE TO THE COURT REPORTER AND RETAIN JURISDICTION OF THE PURPORTED FEDERAL CRIME.

The Court of Appeals further erred in its application of the Federal Rules of Civil Procedure to this case. The Court relied upon them in the single aspect of being authority for the taking of the Appellant's deposition and totally disregarded them beyond this point such as to strip

the Appellant of all the substantive and procedural safeguards and protections which they were designed to afford him in the taking and the perfecting of his deposition. In committing this error, this Court of Appeals has unwarrantedly bestowed Federal jurisdiction upon a deposition which was taken and purportedly perfected through the flagrant disregard and violation of the same set of Federal Rules of Procedure which were relied upon to sustain the competence of the alleged tribunal which took the deposition.

Furthermore, in this respect, it is error of this Court of Appeals to sustain this conviction without rationalizing how any tribunal which perfects its proceedings through use of a false certification can be accorded the dignity of being competent tribunal under the laws and Constitution of the United States.

III

THE COURT OF APPEALS VIOLATED THE PETITIONER'S PRIVILEGE AND IMMUNITY AGAINST SELF-INCRIMINATION BY REQUIRING HIM TO TESTIFY AT THE CONTEMPT HEARING AND THEN INTRODUCING THIS TESTIMONY INTO EVIDENCE AT THE PERJURY TRIAL.

The Court of Appeals committed error in holding that the contempt hearing was civil in nature and possessed no criminal or penal attributes.

To support the Appellant's contention that the contempt proceedings were of a criminal or penal nature it is only necessary to look to the alternatives of the trial judge at the conclusion of those proceedings which were, to-wit:

1) To exonerate the Appellant

2) To fine the Appellant, or

3) To incarcerate the Appellant.

The Court of Appeals further committed error by holding this contempt proceeding to be civil in nature without rationalizing the $5,000.00 appearance bond which the Appellant was required to post.

From the standpoint of constitutional legal philosophy. this Court of Appeals has seriously erred in holding the contempt proceedings to be purely civil in nature when, if such were the case, its only object could have been a proceeding in aid of execution and an effort to force the Appellant Hale to produce $38,000.00 due and owing as a debt; for if this was the purpose of the contempt proceeding then it was a circumvention of the constitutional prohibition against imprisonment for one's debts.

The Court of Appeals further committed error in its interpretation and meaning of the *Thayer* case and its application to the instant case. The Court concluded in footnote four (4) of its opinion,

> *"United States* v. *Thayer,* 214 Fed. Sup. 929 (District of Colorado) 1963, is inapposite for several reasons, not the least of which is that the element of entrapment pervaded the entire discussion of the issues in that case."

The true import of the *Thayer* case is to be found on page 933 of that opinion wherein it says,

> "it can however, be concluded that the circumstances are such as to require careful investigation of the

> circumstances surrounding the taking of the testimony which led to this indictment with a view to determining whether the circumstances comport to the standards of fairness which are referred to by the Supreme Court in the McNabb Case. Circumstances of instigation or of entrapment *or circumstances showing disparity of knowledge as between the government and the accused whereby he lacked realization of the true import of the inquiry would necessarily require exclusion of the evidence.*" (Emphasis added.)

It is thus seen that this Court of Appeals has failed to realize that the *Thayer* case and the *McNabb (McNabb v. U. S.*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819) case go far beyond the strict and narrow legal concept of entrapment and look to the general overall requirement of fairness in the obtaining of all evidence used in a criminal prosecution.

The evidence obtained in the *Thayer* case was obtained under circumstances analogous to those which prevailed at the Appellant's contempt hearing, and to which the Court commented in the *Thayer* case:

> "While the proceedings before the Security and Exchange Commission are not now being condemned, at the same time hazard of unfairness is being recognized and where even such a hazard exists a conviction cannot be approved."

In so far as the element of entrapment is concerned there is just as much of it to be found in the instant case as in the *Thayer* case. The contempt proceeding was instituted with the full knowledge and realization of Plaintiff's counsel that the Appellant was not and could not be guilty of contempt. The Court required the Appellant to appear

and show cause why he should not be convicted for contempt and then, after finding contempt not to be present, persisted in questioning the Appellant on issues and matters which could not conceivably have further bearing upon the contempt matter but which could only be categorized as an interrogation as to the possible commission of a crime. This was done with the Appellant under bond, in the custody of the Court, and unapprised of the fact that the testimony being elicited could or would later be used as the basis for a criminal conviction. These constitute violations of the Appellant's constitutional safeguards and it is error of the Court to rationalize them away as having been self-serving admissions made in a civil proceeding.

It is an error and an illusion by the Court to categorize the Appellant's testimony and evidence as being self-serving admissions given in an effort to avoid incarceration for contempt.

IV

THE COURT OF APPEALS DENIED THE PETITIONER DUE PROCESS OF LAW BY PREDICATING FEDERAL JURISDICTION OVER THE ALLEGED CRIME ON THE WAIVER OF THE PETITIONER'S OBJECTION TO IT AT AN EARLY STAGE OF THE PROCEEDING.

The criminal statute under which the Appellant was indicted and convicted requires that perjury be committed before a competent tribunal, and a failure of the tribunal's competence also constitutes a failure of Federal jurisdiction over the alleged crime. The Court has seen fit to predicate the competence of the court reporter exclusively upon the sufficiency of the notice and authority of that re-

porter and the Appellant's failure to object thereto as required by Rule 32(a) and (b). This argument would be more forceful if the Court had relied upon Rule 32(d) which waives errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed or otherwise dealt with by the officer unless a timely motion to suppress is made. But, even reliance upon this section of the rule would be error. This is true since nowhere in the Rules of Federal Procedure is there a provision whereby defects in a deposition which arise from the officer's total disregard of the rules of procedure in handling a deposition can be waived. Certainly, it can not be said that the failure to file an unsigned deposition with the necessary affidavit of refusal to sign, but rather with a false certification that it *has* been signed, constitutes a mere error or irregularity, and the Court has committed the error of making just such an assumption.

The Court's position requires the necessary conclusion that a failure of Federal jurisdiction can be cured by a Defendant's failure to object to errors and irregularities.

V

THE COURT OF APPEALS DENIED THE PETITIONER DUE PROCESS OF LAW BY APPROVING THE DISTRICT COURT'S ACT OF EXCLUDING TESTIMONY COMPETENT TO SHOW LACK OF INTENT TO HAVE COMMITTED THE CRIME FOR WHICH HE WAS CHARGED.

The Court of Appeals committed further error in its view of the admissibility of certain evidence which the Appellant attempted to introduce at his trial. At page 10 of its opinion this Court states,

"all of such evidence could be admissible only as to the intent of Hale when he committed the crime."

At page 11 of its opinion the Court states,

"much of the evidence rejected by the court was too remote in time to have probative value even as to the element of intent."

Nevertheless, the trial court did allow the Government to introduce evidence as to intent which occurred during this same remote period of time. This disparity of treatment between the accused and the Government is a direct violation of the sense of fairness as it was alluded to by Mr. Justice Frankfurter in the case of *McNabb* v. *United States,* 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819, wherein he pointed out that in the Federal Court, at least, the observance of the minimum constitutional requirements may not be sufficient; that in formulating rules for the reception of evidence in Federal Courts, the Court (Supreme Court) must be guided by consideration of justice and fair play.

CONCLUSION

The Appellant's conviction has been obtained and affirmed in the Federal Courts under the clouds of questionable jurisdiction and unacceptable observance of Constitutional standards of Justice and due process.

The briefs and argument of the Appellant, as well as the record on appeal, substantiates a *prima facie* showing of reversible error, to all of which the Court of Appeals has answered with a nebulous opinion. This opinion affirms

the Appellant's conviction by relying upon legal fictions to dispose of some assignments of error and disposes of others by either ignoring them or relying upon misapplications of the Federal Rules of Civil Procedure.

A sense of justice and fairness requires that this appeal be reviewed and reconsidered so that the Court may dispose of the Appellant's contentions and propositions in a manner consonant with the judicial standards required under the laws of the United States of America.

Respectfully submitted,

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April, 1969

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
JAN 21 1969
William L. Whittaker
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NOVEMBER, 1968, TERM

CLYDE H. HALE, JR., Appellant,	)	
vs.	)	Number 10,005
UNITED STATES OF AMERICA, Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(District Court No. Cr. 67-216)

John C. Moran, Oklahoma City, Oklahoma, for Appellant; David A. Kline, Assistant United States Attorney, (B. Andrew Potter, United States Attorney, on the brief), Oklahoma City, Oklahoma, for Appellee.

Before LEWIS, HILL and SETH, United States Circuit Judges.

[APPENDIX]

HILL, Circuit Judge.

Appellant was tried and convicted before a jury on a one count indictment charging the crime of perjury under 18 U.S.C. § 1641. There is little dispute as to the facts as disclosed by the evidence and appellant chiefly relies upon legal technicalities as he apparently did in the trial court.

In March, 1966, two residents of Puerto Rico filed a civil suit in the United States District Court for the Western District of Oklahoma against appellant, two other individuals, Kelley and Rogers, and a corporation owned by Kelley and Rogers, to recover, among other items, the sum of $38,000. Plaintiffs alleged that they had paid this amount to the three individual defendants as a "standby fee" and because of defendant's failure to perform they were entitled to the return of the fee. At the time this suit was commenced counsel for plaintiffs filed a notice to take the depositions of Hale, Rogers and Kelley. The depositions were to be taken in the office of Hayden Addington, an official court reporter for the Western District.[1] Subpoenas and notices were issued and served on the three defendants and, pursuant thereto, the three appeared on April 13, 1966, in the office of the court reporter to be deposed. One of the associates in the Addington firm, a Mrs. Cline, who was a notary public and certified court reporter in the State of Oklahoma, appeared and administered the usual oath before proceeding to record appellant's deposition. During the course of the deposition Hale testified that he received the "standby fee" in the form of three money orders and a check; that he converted these into cash and put the cash in a safety deposit box in an Oklahoma City bank; and that the cash was at the time of the deposition in the safety deposit box. Little discovery evidence was thereafter obtained during the taking of the depositions of Kelley and Rogers as both invoked the Fifth Amendment and refused to testify.

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[1] In addition, Addington operates a court reporting service in downtown Oklahoma City under the name, Hayden Addington & Associates.

On May 5, 1966, the court issued an injunction directing Hale to hold the $38,000 pending the outcome of the litigation and on November 6, 1966, the court entered a default judgment against Hale and directed him to pay the $38,000 into court. Hale failed to comply and he was ordered to show cause why he should not be held in contempt of court. Hale filed an answer to the show cause order and attached thereto his affidavit. In that affidavit he admitted that at no time after the civil suit was filed did he have possession of any of the funds involved in that litigation. A formal hearing in this civil contempt proceeding was held before one of the judges of the Western District on January 25 and 26, 1967. Hale appeared personally at the hearing, was represented by counsel, and took the witness stand and testified. By his testimony there he expressly admitted that he had not told the truth at the time of the taking of the April 13 deposition. The civil contempt proceeding was thereafter dismissed because of Hale's showing an inability to comply with the order of the court and a knowledge of this inability on the part of the plaintiffs' attorneys when they commenced the proceeding. The perjury aspect of the case was thereafter presented to a Grand Jury and the indictment in this case was returned.

Appellant first contends that the admissions made by him during the civil contempt proceeding were inadmissible because they amounted to a confession and were obtained from him during questioning by the trial judge at a time when he was in custody under bond and unapprised that such admissions would be used against him in a criminal case. We view this argument as ingenious but wholly without merit. As pointed out by the appellee, not only did Hale voluntarily attach an affidavit to his answer in the contempt case, but later at the hearing, where he was represented by counsel, he took the witness stand without objection and repeated the admissions made in that affidavit, but in somewhat more detail.

[APPENDIX]

Statements made by a party on the witness stand, if adverse to his interest, are considered to be admissions,[2] and as such, they are admissible evidence against the maker in a subsequent criminal prosecution against him.[3] Apparently appellant would have us take Hale's statements out of the classification of admissions and categorize them as a confession. We do not follow this line of reasoning but instead consider the statements made by Hale, both in the filed affidavit and in his oral testimony, to be admissions made during the course of civil proceedings and admissible against him in the subsequent perjury prosecution in accordance with the above stated rule. Even if we accept appellant's categorization of these statements and deemed them a confession, the record does not disclose any illegality in the obtaining of the statements. Appellant, a lawyer with many years of experience who was represented by two additional lawyers, voluntarily filed the affidavit and testified on the witness stand without objection. He deliberately chose this strategy in his efforts to thwart the contempt proceedings. In this connection we must observe that on cross-examination during the trial of this case, Hale corroborated the testimony he had given during the taking of the deposition—the very testimony covered by this point and the false testimony upon which the perjury charge is based. He also complains that while he was testifying at the contempt hearing the trial judge questioned him in some detail about his connection with the $38,000 item. To us the record discloses only diligence on the part of the trial judge in an effort to bring out all

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[2] Pope v. Allis, 115 U.S. 363 (1885); Vincent v. Young, 324 F.2d 266 (10th Cir. 1963); Milton v. United States, 110 F.2d 556 (D.C. Cir. 1940); Warde v. United States, 158 F.2d 651 (D.C. Cir. 1946); Taylor v. United States, 327 F.2d 232 (5th Cir. 1964). See, 9 Wigmore, Evidence § 2594a.

[3] Harrison v. United States, 392 U.S. 219 (1968); Edmonds v. United States, 273 F.2d 108 (D.C. Cir. 1959); United States v. Castellana, 349 U.S. 264 (2d Cir. 1965); Ayres v. United States, 193 F.2d 739 (5th Cir. 1952).

of the material facts. We have considered all of the authorities[4] cited by appellant on this point and must conclude that they are simply not applicable to the facts of this case.

Appellant next attacks the validity of the indictment and the entire prosecution. He contends that he did not read or sign the transcript of the testimony taken by the deposition; that the deposition was not taken in accordance with the subpoena he received; that the deposition was not timely filed; that he was not given notice of the filing; and that the deposition was never offered into evidence. Based upon these alleged failures of the deposition to conform to the Federal Rules of Civil Procedure, appellant would argue that the deposition was not a deposition under the laws of the United States and, therefore, cannot be the basis for a perjury prosecution.

The essential elements of the crime of perjury under 18 U.S.C. 1621 are the taking of an oath authorized by a law of the United States before a competent tribunal, officer or person and the giving of a false statement, wilfully made, as to facts material to the hearing.[5] It is clear from the record that all of these elements are present in this case. Rule 28(a), F. R. Civ. P. expressly authorizes the taking of depositions "before an officer authorized to administer oaths by the laws . . . of the place where the

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[4] Sacher v. United States, 252 F.2d 828 (D.C. Cir. 1958) *rev'd on other grounds*, 356 U.S. 576; United States v. Goodner, 35 F. Supp. 286 (D. Colo. 1940); and In re Nachman, 114 Fed. 995 (D. S. C. 1902), were all situations in which the issue involved the right of a party to refuse to testify. We would agree that the privilege applies to all statements made in open court i.e., the witness or party litigant may not be compelled to testify, however, appellant was not so compelled except in his own enlightened self-interest. United States v. Thayler, 214 F. Supp. 929 (D. Colo. 1963), is inapposite for several reasons, not the least of which is that the element of "entrapment" pervaded the entire discussion of the issues in that case.

[5] United States v. Hvass, 355 U.S. 570 (1958).

examination is held. . . ." By this measure Mrs. Cline was a proper person to administer the oath to Hale and a person before whom the deposition could be taken. We do not have the notice to take the deposition in the record but the subpoena served on Hale directed him to appear in the office of Hayden Addington in downtown Oklahoma City for the taking of the deposition. The record does not show any objections by Hale to the sufficiency of the notice or to the authority of Mrs. Cline, as is required by Rule 32(a) and (b), F. R. Civ. P.

Appellant also complains that he did not read or sign the deposition after it was transcribed. Mrs. Cline testified that she made a request to Hale by letter to sign the deposition to which he did not respond. However, this argument is wholly immaterial, as is the argument concerning the late filing of the deposition, the lack of notice to Hale as to the filing of the same, and the failure to use the deposition in the trial of the case. When the oath was administered to Hale and he thereafter wilfully gave false testimony as to material facts in the case, all of the elements of the offense were present and the crime of perjury had been committed. United States v. Norris, 300 U.S. 564 (1957). We need not go into the right of a person to retract his testimony or to purge himself after committing perjury because the facts here show no such timely effort on the part of appellant.[6]

Lastly, appellant points error by the trial judge in excluding evidence offered by the defense. Without doubt, some six months after the crime had been committed Hale consulted with an attorney, who advised a full disclosure of the false statement to the opposing counsel in the civil suit and such a disclosure was made at that late date. This evidence was stricken from the record upon objection by the Government. In addition, the trial judge refused to permit Hale to testify about his efforts, over a long period

[6] See generally, Annot., 64 A.L.R. 2d 276 (1959).

of time subsequent to the deposition, to recoup the $38,000 from Kelley and Rogers. All of such evidence could be admissible only as to the intent of Hale when he committed the crime. The court did permit Hale to testify that although, on the date of the deposition, he knew the $38,000 was not in the safety deposit box, he did believe in good faith that such sum was to be procured that day by Kelley.

The trial judge has wide discretion in ruling upon the admissibility of evidence and particularly evidence of this character.[7] The trial judge here acted within the range of his discretion on these questioned evidentiary rulings. A careful reading of the trial record shows that the trial judge exercised this discretion liberally and received considerable questionable evidence offered by the defense. Much of the evidence rejected by the court was too remote in time to have probative value even as to the element of intent. Furthermore, the element of willfulness in this case, under the overwhelming weight of the undisputed evidence, including the testimony of appellant in his own defense, is so clear and free from doubt that nothing appellant did or could have done subsequent to April 13, 1966, would have overcome it.

AFFIRMED.

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[7] N.L.R.B. v. Donnelly Garment Co., 330 U.S. 219 (1947); Brigham Young Univ. v. Lillywhite, 118 F.2d 836 (10th Cir. 1941) cert. den. 314 U.S. 638; United States v. Kahaner, 317 F.2d 459, 472 (2d Cir. 1963) cert. den. 375 U.S. 385; Mitchell v. United States, 213 F.2d 951 (9th Cir. 1954) cert. den. 348 U.S. 912.

APPENDIX B

PORTION OF THE DEPOSITIONS OF CLYDE H. HALE, JR., and CARL E. ROGERS

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

LUIS MIRANDA CASANAS and VICTOR L. ALVAREZ,	)	
Plaintiffs,	)	
vs.	)	No. 66-126 Civil
JAMES E. KELLEY, CARL E. ROGERS, R&K ENTERPRISES, INC., and CLYDE H. HALE, JR., TRUSTEE,	)	
Defendants.	)	

DEPOSITIONS of
CLYDE H. HALE, JR., and CARL E. ROGERS
Taken at Oklahoma City, Oklahoma
April 13, 1966
(Original)

PLAINTIFF'S
EXHIBIT
6

67-216 CR.

HAYDEN M. ADDINGTON & ASSOCIATES
Certified Shorthand Reporters
General Court Reporting

Phone CEntral 2-0194 1910 First National Building
Oklahoma City, Oklahoma 73102

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

LUIS MIRANDA CASANAS and VICTOR L. ALVAREZ,	)	
Plaintiffs,	)	
vs.	)	No. 66-126 Civil
JAMES E. KELLEY, CARL E. ROGERS, R&K ENTERPRISES, INC., and CLYDE H. HALE, JR.,	)	
Defendants.	)	

DEPOSITIONS OF CLYDE H. HALE, JR. and CARL E. ROGERS, produced as witnesses on behalf of the Plaintiffs, in the above styled and numbered cause, beginning at 1:45 o'clock p.m., on the 13th day of April, 1966, in the offices of Hayden M. Addington & Associates, located at 1910 First National Building, in the City of Oklahoma City, County of Oklahoma, and State of Oklahoma, before me, Nona M. Cline, a Certified Shorthand Reporter, duly certified under and by virtue of the laws of the State of Oklahoma, pursuant to notice.

APPEARANCES:

Mr. John J. Snider, Fellers, Snider, Baggett & McLane, Attorneys, First National Building, Oklahoma City, Oklahoma, for the Plaintiffs.

Crowe, Boxley, Dunlevy, Thweatt, Swinford & Johnson, Attorneys, First National Building, Oklahoma City, Oklahoma, for the Defendants.

(And thereupon, the following proceedings were had and recorded, and the said Plaintiffs produced the following witnesses, in the following order, to-wit:)

MR. MEYERS: It is hereby stipulated by and between parties by counsel that Defendants, James E. Kelley, Carl E. Rogers, Clyde H. Hale, Jr., that all objections of whatsoever nature which may properly be raised at this Deposition are hereby reserved to the time of trial, save and except any objections on the grounds of self incrimination under the Fifth Amendment of the United States Constitution.

MR. SNIDER: It is so stipulated. Let the record also show that all of the parties are present, all the individual parties are present, and it may also be stipulated that R&K Enterprises, Incorporated, is represented and present by its President, Mr. Kelley.

CLYDE H. HALE, JR.,

of lawful age, being by me first duly sworn, as hereinafter certified, deposes and says as follows:

I made a practice of sending a copy to Mr. Miranda and R&K. I could find nothing. Again, my secretary has torn up my office, and we are looking hard for everything I've got. I can't even find the letter I wrote to Mr. Heil.

Q. Apart from any confidential communications between you and your clients or any work products or anything of that nature, if there are copies of any correspondence in your file either to Alvarez or Miranda or any of the borrowers in Puerto Rico, will you furnish us with copies of them in the next week?

A. I will, but I don't have anything other than what's here, I'm almost sure. I will look again, and you can come look with me.

MR. SNIDER: I don't have anything else.

MR. HOLLOWAY: I don't have any questions.

MR. SNIDER: As you know—

A. I would like to read it.

Q. You want to sign the deposition?

A. Yes, sir.

(Witness excused)

(Signature of witness)

STATE OF OKLAHOMA)
) ss:
COUNTY OF OKLAHOMA)

SUBSCRIBED AND SWORN TO BEFORE ME this ..... day of ....., 1966.

Notary Public,
State of Oklahoma.

My commission expires:
June 3, 1967.

CARL E. ROGERS,

of lawful age, being by me first duly sworn, as hereinafter certified, deposes and says as follows:

DIRECT EXAMINATION

BY MR. SNIDER:

Q. Would you state your name, address and occupation, please?

A. Carl Rogers, 1901 Northwest 56th, mortgage business.

Q. Pardon me?

A. Mortgage business.

Q. What is your age, Mr. Rogers?

A. Thirty-nine.

Q. Do you maintain an office?

A. Yes.

Q. Where is your office?

A. United Founders Tower.

CERTIFICATE

STATE OF OKLAHOMA)
) ss:
COUNTY OF OKLAHOMA)

I, NONA M. CLINE, a Certified Shorthand Reporter, duly certified under and by virtue of the laws of the State of Oklahoma, do hereby certify that the witnesses, Clyde H. Hale, Jr., and Carl E. Rogers, whose Depositions are hereinabove set forth, were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in the case aforesaid, and that their said Depositions were by me correctly taken stenographically, and were thereafter transcribed and reduced to typewriting, and that their signatures thereto, when transcribed, were affixed by the witnesses; and I further certify that said Depositions, as above set forth, constitute a true record of the testimony given by said witnesses.

I further certify that said Depositions were taken pursuant to notice, and that the taking of said Depositions commenced at 1:45 o'clock p.m., on the 13th day of April, 1966, and were taken in the offices of Hayden M. Addington & Associates, located at 1910 First National Building, in the City of Oklahoma City, County of Oklahoma, and State of Oklahoma.

I further certify that Mr. John J. Snider, Attorney, First National Building, Oklahoma City, Oklahoma, ap-

peared as attorney on behalf of the Plaintiffs, and that Mr. Kent Meyers and Mr. William J. Holloway, Jr., Attorneys, First National Building, Oklahoma City, Oklahoma, appeared as attorneys on behalf of the Defendants.

I further certify that I am not an attorney or counsel of any of the parties, or a relative or employee of any attorney, counsel, or party connected with the action, or financially or otherwise interested in the action.

WITNESS MY HAND AND SEAL, in the City of Oklahoma City, in the County of Oklahoma, and in the State of Oklahoma, on this, the 20th day of April, 1966.

Nona M. Cline

Certified Shorthand Reporter,
State of Oklahoma.

APPENDIX C

PORTIONS OF THE TRANSCRIPT OF PROCEEDINGS
OF CIVIL CASE NO. 66-126
From Plaintiff's Exhibit 16

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

LUIS MIRANDA CASANAS AND VICTOR L. ALVAREZ, Plaintiffs,	)	
vs.	)	CASE NO. 66-126
JAMES E. KELLEY, CARL E. ROGERS, R & K ENTERPRISES, INC. AND CLYDE H. HALE, JR., TRUSTEE, Defendants.	)	CIVIL

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

JOHN JOSEPH SNIDER, ATTORNEY AT LAW, 2700 FIRST NATIONAL BUILDING, OKLAHOMA CITY, OKLAHOMA;

FRANK GRAYSON, LEONHARDT BUILDING, OKLAHOMA CITY, OKLAHOMA, APPEARING ON BEHALF OF THE DEFENDANTS;
CLYDE H. HALE. JR.

FILED
MAR 24 1967
Vera L. Howard
Clerk, U. S. District Court
By Vera Coleman
Deputy

THE FOLLOWING TRANSCRIPT IS ONLY THAT PROTION REQUESTED BY JOHN RALEY, JR., U. S. DISTRICT ATTORNEY. THE FOLLOWING PROCEEDINGS CAME ON FOR HEARING ON THE 25TH AND 26TH DAY OF JANUARY, 1967, BEFORE THE HONORABLE FRED A. DAUGHERTY, U. S. DISTRICT JUDGE. PLAINTIFF'S

EXHIBIT
16
67-216 CR.

CLYDE H. HALE, JR.,

Being of lawful age was duly sworn upon his oath and testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. SNIDER:

Q Would you state your name and address please?

A Clyde H. Hale, Jr.

Q You're an Attorney at Law, are you not?

A Correct

Q How long have you been licensed to practice in Oklahoma?

A I was admitted in 1951.

Q Mr. Hale, you are a defendant in these proceedings, Civil Number 66-126, are you not?

A Yes sir, that is correct.

Q Prior to the filing of that litigation, you have been counsel, have you not, for R & K Enterprises and James E. Kelley and Carl E. Rogers?

A That is correct sir.

Q Were you acting as counsel, say from January, 1966 until this lawsuit was filed in March?

Q Now, it has been brought out here, Mr. Hale, that certain depositions were taken in which you gave an answer that you had this money in your Safety Deposit Box at the May Avenue Bank. Are you telling the Court at this time, that this was error?

A That is correct, I am.

Q Well, what explanation do you have to give the Court for making those statements under your deposition?

MR. SNIDER: In your own words.

A The reason, believing first, that I was representing people who had, I had been dealing with, who had never lied to me at any time. In the latter part of December, 1965, a matter came to my attention, through my clients which I requested them to bring me Fifteen Thousand Dollars in cash and almost within moments, they did deliver to my office, Fifteen Thousand Dollars in cash of which I put in a Safety Deposit Box.

Q Well that is concerning another matter.

A That is correct.

Q Alright, go ahead.

* * * * * * *

THE CLERK: That is right, it is already in, it is plaintiff's Exhibit Number 2.

MR. SNIDER:

Q Plaintiff's Exhibit Number 2, Mr. Hale, the receipt signed by Mr. Kelley, can you fix the approximate time when this receipt was given? Would it have been prior to August, 1966?

A I would say yes, prior to August '66.

Q We have nothing further of this witness.

THE COURT:

Q Are you served with a summons in this case?

A In the original case your Honor.

Q Yes.

A Yes sir, in the original case I was.

Q And in case number 66-126 in this court?

A Yes sir.

Q And then, you gave your deposition, is that right?

A That is correct sir.

Q And you were asked questions about the Thirty Thousand Dollars and you testified that you had this money in your Safety Deposit Box?

A I did sir.

Q Were you under oath at that time?

A I was.

Q And is this the truth, at the time that deposition was taken?

A No sir, it was not the truth.

Q Well, why did you testify under oath to an untrue statement?

A Because I stated before, your Honor, I was advised by Mr. Kelley that the money would be in my hands where it would be placed in my Safety Deposit box before the day was over. Other than that, I can give no reason to this Court or anyone else as to why I did it.

Q And when did Kelley tell you this?

A He told me the morning of the deposition and the date before that.

Q He told you when?

A The deposition, I think was taken on the 13th of April. He advised me of this the afternoon of the 12th, late in the afternoon, before 4:30 and then the morning of the deposition on the 13th.

Q But, you never got the money?

A No sir.

Q After the, your deposition was taken, in which you stated under oath that you had the Thirty Eight Thousand Dollars in your Safety Deposition Box, that was the jest *(sic)* of your testimony, was it not?

A Yes sir.

Q You had the Thirty Eight Thousand Dollars in your Safety Deposit Box in the May Avenue Bank. Now after that deposition, did you receive an Order of the Court directing you not to disperse or dispose of those funds?

A I did your Honor.

Q And how soon after your deposition did you receive this Order?

A I would say it was around the 25th of April your Honor. I am not sure of that date.

Q Now, at that time—

A It may have been later than that.

Q At that time, had you received the money from Kelley?

A I had not.

Q. Did you know anything to inform the Court, either yourself or through counsel, that you could not comply with this Order because you didn't have the money?

A I did not your Honor.

Q And why didn't you?

A The only answer I can give to that your Honor is, Mr. Kelley kept saying that he would get the money.

Q What efforts did you make to see that Kelley complied with this statement that he made to you?

A Everything humanly possible, including going with him to various places where he said he had money, expending my own money to try to get this man to pay the money that he should have paid to me.

Q Did you, at some time, become convinced that he wasn't going to give you the Thirty Eight Thousand Dollars?

A That is correct your Honor, I sure did.

Q And when did you become convinced of that?

A As to the correct time your Honor, I am not sure. I would say probably mid May or June.

Q. At that time, did you do anything to set the records straight or to advise the Court or to advise the plaintiff's or the plaintiff's attorneys?

A I did not your Honor.

Q And why didn't you?

A. At that time, if my memory is correct, there was a period of time in this case where there was no counsel of record.

Q For whom?

A For any of the partys.

Q There is always counsel of record for the plaintiff.

A I am sorry, the defendants.

Q My question was, when you became convinced that Kelley wasn't going to give you the Thirty Eight Thousand Dollars that you say was the reason why you testified falsely, why you didn't do anything with

reference to the order of the Court when I told you to hold this money and not disperse it. When you became convinced that you weren't going to get it, why didn't you advise or set the record straight about this?

A At that time, I cannot answer you as to the reason why.

Q Well, you're an attorney, aren't you?

A Yes sir, I am.

Q And didn't you realize the seriousness of giving false testimony under oath?

A I do sir.

Q And seriousness of being served with a Court Order, based on the deposition you had Thirty Eight Thousand Dollars, to freeze it and hold it.

A I am aware of that sir.

Q And yet, when you not only committed false testimony or *purgery,* but you likewise, upon receipt of the Court Order and even later when you became convinced that you weren't going to get the money, why is it that you didn't do something to correct your deposition and inform plaintiff's counsel or the Court that you would be unable to comply with the Court Order. Why didn't you do something to let the Court know and let the plaintiff's know that in this case, there was not Thirty Eight Thousand Dollars in cash frozen and immobilized, available for the final Order of the Court?

A Your Honor, I was attempting to do everything within my *effort* to assist Mr. Kelley to obtain this money and I was convinced, myself that it was impossible. I frankly did not know what to do and finally I was able to seek counsel to advise me.

Q Well now, you're a lawyer yourself, are you not?

A Yes sir, I am sir.

Q When did Kelley go to the penitentiary?

A I believe in January, this year your Honor, I am not sure when.

Q Of '67?

A It was just before Christmas of '66. I am not sure of the date.

Q Is the Safety Deposit Box in the May Avenue Bank that Mrs. Hulett testified about the only Safety Deposit Box that you have got?

A No sir, I have one in the Liberty National Bank.

Q That is the only one you had in the May Avenue Bank?

A That is correct sir.

Q And you had this Safety Deposit Box when you testified?

A Yes sir.

Q But, you did not have it when you received the Twenty Nine Thousand Dollars?

A I did not have it, the one in the May Avenue Bank, no sir, I had one at the Liberty National Bank.

Q You didn't have it when you received the Nine Thousand Dollars, is that right?

A Well, I don't recall the day, it seems like I opened it in February and I got the check with the Nine Thousand Dollars in January, so that is correct, I did not have it.

Q Did you ever put any part of this Thirty Eight Thousand Dollars in your Safety Deposit Box in the Liberty National Bank?

A I did not.

Q Did you put it in any bank account, except the Nine Thousand Dollars?

A No sir.

Q Well then, it is your testimony as I take it, that you got the Thirty Eight Thousand Dollars from the plaintiff, you immediately returned it to Kelley?

A That is correct.

Q And when your deposition was taken, you gave false testimony to the effect that you had it and had it in a Safety Deposit Box.

A That is correct.

Q And you received a Court Order freezing it, you did nothing about?

A That is correct.

Q And you did nothing about it?

A That is correct.

Q And you did nothing about at any time until the Court ordered you to pay it into the Registry of the Court, as far as telling the plaintiff's *(sic)* or telling the Court about the true situation as you say it existed.

A That is not quite right your Honor. Mr. Snider was aware through Mr. George, before this Court Order told me, before your Order told me to pay it into the Registry, I did not have it.

Q And this was late in '66?

A October, I believe your Honor, the exact date, I don't know, I don't know whether it was the first or the last of October.

Q Alright, that is all.

RECROSS EXAMINATION

BY MR. GRAYSON:

CERTIFICATE

I, R. Lee Cook, do hereby certify that I am a duly appointed, qualified and acting official court reporter in and for the United States District Court for the Western District Court for the Western District of Oklahoma.

I further certify that the foregoing proceedings were taken by me in my official capacity in stenotype.

I further certify that my said machine shorthand notes were later transcribed and reduced to typewriting under my supervision and that the foregoing is a true and correct typewritten transcription of the proceedings had as aforesaid.

R. Lee Cook

R. Lee Cook,
United States District Court Reporter
P. O. Box 1469
Oklahoma City, Oklahoma

APPENDIX D

PORTIONS OF THE TRANSCRIPT OF THE PROCEEDINGS OF THE PERJURY TRIAL

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

THE UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	No. 67-216 Criminal
CLYDE H. HALE, JR.,	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

Appearances:

THE HON. LUTHER B. EUBANKS,
District Judge, presiding.

MR. DAVID A. KLINE,
Assistant U. S. Attorney
Federal Building,
Oklahoma City, Oklahoma
appeared for the Plaintiff.

MR. JOHN C. MORAN,
915 Leonhardt Building,
Oklahoma City, Oklahoma
appeared for the Defendant.

BE IT REMEMBERED, that on the 6th and 7th of November, 1967, the above matter coming on for trial before the Honorable Luther B. Eubanks, District Judge in

and for the United States District Court for the Western District of Oklahoma, and a jury, and the parties appearing in person and/or by counsel, as hereinabove set forth, the following proceedings were had:

Maynard E. Peterson, CSR
Official Court Reporter.

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R. LEE COOK,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KLINE:

Q Would you please state your name.

A R. Lee Cook.

Q Where do you live, Mr. Cook?

A 637 Reynolds Road in Edmond, Oklahoma.

Q What is your business?

A I'm a United States District Court Reporter for the Western District of Oklahoma.

Q And how long have you been so employed?

A In this particular job, about two years and two or three months.

Q Were you the Official Court Reporter and reporting for Judge Dougherty on January 25th and January 26th of 1967 when the defendant, Mr. Clyde H. Hale, Jr., testified in a Civil Case No. 66-126, concerning an Order to Show Cause?

A I was.

Q During this hearing, did you take down the defendant's complete testimony and thereafter transcribe and reduce a portion of the overall transcript to typewritten form?

A Yes.

Q I hand you what, for convenience, has been identified as Plaintiff's Exhibit 16. Tell us what this is, if you can.

A This is an official transcript prepared under my supervision.

Q Is this the original?

A Yes, it is.

Q Now, will you tell us, does this include the testimony given by Mr. Hale during that proceeding?

THE COURT: Excuse me just a moment. The Rule has been invoked. I just happened to recognize one witness, yes, Miss Johnson, if you would wait outside a moment.

Now, go ahead, Mr. Kline.

A Yes, it does.

[APPENDIX]

Q (By Mr. Kline) Would you tell us whether or not the defendant, Mr. Hale, was duly sworn to tell the truth, prior to giving this testimony.

A He was.

MR. MORAN: We believe that the whole transcript of the whole proceedings should be made and offered, rather than partial, parts of it.

THE COURT: Overruled. You may proceed.

Q (By Mr. Kline) Please refer to Page 2, and if you would, read from Lines 1 through 18.

A Through 18?

Q Yes.

A "Clyde H. Hale, being of lawful age, was duly sworn upon his oath and testified as follows: To-wit: Direct Examination by Mr. Snider:

"Question: Would you state your name and address, please?

"Answer: Clyde H. Hale, Jr.

"Question: You are an Attorney at Law, are you not?

"Answer: Correct.

"Question: How long have you been licensed to practice in Oklahoma?

"Answer: I was admitted in 1951.

"Question: Mr. Hale, you are a defendant in these proceedings, Civil No. 66-126, are you not?

"Answer: Yes, sir, that is correct."

Q Now, please turn to Page 3, and beginning with Line 2, read the rest of that page.

A "Question: Mr. Hale, do you recall your sworn deposition testimony which you gave in these—in this pro-

ceedings on April 13, 1966, in which you testified, in substance, that $38,000 paid to you as Trustee by Alvarez and Miranda was, at that time, deposited in your safety deposit box at the May Avenue Bank in Oklahoma City?

"Answer: Yes, sir.

"Question: Do you recall that you also testified at that time that only you had access to that box?

"Answer: That is correct.

"Question: And on November 8, 1966, are you—

"Interruption by the Court: What is the date of this deposition?

"By Mr. Snider: Sir?

"By the Court: Can you fix the date of the deposition?

"By Mr. Snider: Yes, sir, April 13, 1966.

"Proceeding on with the question by Mr. Snider: And have you received a copy of the Order entered by the U. S. District Court for the Western District of Oklahoma on November 8, 1966, directing you to pay that $38,000 into the Registry of this Court?"

Q Please continue the rest of that page.

A "Answer: I did receive it.

"Question: Have you paid that money into Court?

"Answer: I have not.

"Question: Mr. Hale, do you have the $38,000 in your possession at this time?

"Answer: I do not.

"Question: Have you ever had the $38,000 in your possession?

"Answer: In two, not a total of $38,000 at any one time, no.

"Question: Did you receive from plaintiffs in this case a check, or, rather, cabled or wired funds totalling $29,000 as a stand-by fee, in connection with a proposed mortgage loan commitment for the Hospital Commonwealth Development Corporation in Puerto Rico?

"Answer: I did.

"Question: And did you receive that in early January of 1966?

"Answer: That would be approximately correct, yes, sir.

"Question: Those funds were made payable to you, were they not?"

Q Answer?

A "Answer: They were."

Q Now, please refer to Page 10, and beginning at Line 6, read the rest of that page.

A "Question: You have also previously testified in your deposition of April 13, 1966, Mr. Hale, to having received from the plaintiffs the sum of $9,000 which came as a check from them, payable to you, Clyde H. Hale, Jr., Trustee, when you received, or did you receive that check?

"Answer: I did receive such a check.

"Question: And in your deposition that we just referred to, you testified, did you not, that that $9,000 was also deposited—"

MR. MORAN: Pardon me, what page are you reading from?

MR KLINE: Page 10.

MR MORAN: Where? For some reason, they deleted Page 10.

MR. KLINE: I have a copy.

MR. MORAN: Do you have an extra copy?

MR. KLINE: Yes.

Where would you like to have him start again?

MR. MORAN: That's all right. I can pick it up from here.

Q (By Mr. Kline) Continue, if you would, then, Mr. Cook.

A "Question: And in your deposition that we just referred to, you testified, did you not, that that $9,000 was also deposited with the $38,000 in the safety deposit box at the May Avenue Bank?

"Answer: It was stated $9,000 was put with 29,000.

THE COURT: All right, sir. You may call your first witness on behalf of the defendant.

JAMES W. GEORGE,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MORAN:

Q Will you state your name, please, sir.

A James W. George.

Q And are you an attorney at law?

A Yes, I am.

Q You are licensed under the laws of the State of Oklahoma, are you?

A Yes, sir.

Q You are a member of the Oklahoma Bar Association?

A Yes, sir.

Q And how long have you been a member, sir?

A For ten-and-a-half years.

Q Mr. George, for the purpose of the record, we would like to state that Mr. Clyde Hale, Jr., waives any privilege that he might have and authorizes you to disclose fully and completely any conversation or advice that you have given him.

A Thank you.

Q Now, during the month of October of 1966, did you have an occasion to visit with Mr. Clyde Hale, Jr.?

A Yes, sir, I did.

Q And can you tell us what the nature of that conversation was?

A Yes, sir. Mr. Hale came to my office and advised me that he was involved in a lawsuit involving some Puerto Ricans where he represented some parties in a business transaction and that he had been ordered by the Court to pay over certain sums of money to the Court, and that he didn't have it, and he explained to me that he had, in a deposition, earlier, had testified that he did have the money, and he wanted to do something about it. And I advised him that I thought—

MR. KLINE: Your Honor, I believe he ought to ask the questions a little more specifically, here, not just turn this witness loose and specifically, at this point, too, we can see we are getting right into matters that are immaterial that happened in October, 1966, after the charged perjury here occurred in April.

We object to any testimony along this line.

THE COURT: Of course, it could save time by asking general questions, but—

MR. KLINE: We have no opportunity to object, though, Your Honor, and we really do believe that he ought to detail what—

THE COURT: All right.

MR. KLINE: (Continuing)—what it is he expects to get from this witness.

THE COURT: All right, then. So you may make your—I think he has outlined generally, anyhow, what the nature of the meeting with the defendant was.

Q (By Mr. Moran) Mr. George, you have stated concerning a deposition that Mr. Hale gave. Could you complete that conversation with regard to the deposition and the advice you gave him concerning that?

A Yes, sir.

MR. KLINE: Your Honor, the advice he gave could not possibly be relevant to this criminal prosecution. This happened months after the alleged crime, and his advice or their conversation could have no materiality to this case.

THE COURT: I don't see how it could, at this time. However, I don't know what counsel is leading up to. Of course, I don't know what the testimony is going to be.

Go ahead, but you may renew your objection after the answer is given, not knowing what it may, it could possibly be relevant.

Go ahead.

A I advised Mr. Hale that he should immediately make a disclosure of the erroneous statements he had made

in the deposition, and he agreed with me and gave me his permission to immediately go to the plaintiffs' lawyer and make a full disclosure, which I did.

MR. KLINE: Your Honor, to which we object, and we ask it be stricken from the record; this could only go to mitigation, in the event the jury finds this defendant guilty.

MR. MORAN: If the Court please, I would like to be heard there.

THE COURT: Well, the objection is sustained. We are here concerned, the jury knows that, counsel knows that, with whether or not perjury was committed by the accused on April the 13th, 1966, so I'm going to order the last remarks made by this witness stricken as being immaterial, irrelevant, and not being a defense to this case.

Go ahead, counsel.

MR. MORAN: For the purpose of the record, could I respectfully call the Court's attention that on direct testimony, the District Attorney was allowed to bring in evidence of four months prior to this, and at least seven months after the alleged—

THE COURT: Yes, sir.

MR. MORAN (Continuing)—act, and that this transaction here occurs within the time period that the Court allowed the District Attorney to offer evidence.

THE COURT: Well, now, insofar as it might tend to impeach or refute the Government's testimony, surely, I will let you do that, at any time that the Government testified, but this would not do so, Mr. Moran.

MR. MORAN: We would offer for evidence with regard to willfulness, if the Court please.

THE COURT: Well, if you can show, go ahead; but, again, we are concerned with what occurred on the 13th of April.

MR. MORAN: In view of the Court's ruling, I don't believe I have any choice but to state that I am through with this witness.

THE COURT: All right.

Do you have any questions?

MR. KLINE: No questions.

THE COURT: All right. You may step down, sir.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1325

CLYDE H. HALE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 406 F. 2d 476.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1969. A petition for rehearing was denied on March 17, 1969.[1] The petition for a writ of certiorari, filed on April 28, 1969, is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] On April 7, 1969, the court of appeals recalled and stayed its mandate until April 27, 1969.

352-480—69

QUESTIONS PRESENTED

1. Whether it was improper to convict petitioner of perjury, because the deposition in which he made the allegedly perjurious statements was not signed by him and because it contained an apparent error in the certificate of the officer who administered the oath.

2. Whether petitioner's testimony in a civil contempt case admitting the falsity of the deposition could be used against him at his subsequent trial for perjury.

3. Whether the trial court erred in excluding certain evidence offered by the defense.

STATEMENT

After a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted on a one-count indictment for perjury in violation of 18 U.S.C. 1621 in a deposition made under oath before a notary public in connection with a civil case pending in a federal district court. On February 1, 1968, he was sentenced to fifteen months' imprisonment.

1. The evidence showed that during January 1966, petitioner, a lawyer in Oklahoma City, received, as trustee, the sum of $38,000 from Puerto Rican businessmen interested in obtaining mortgage financing for contemplated hospital construction in Puerto Rico (Tr. 136, 140, 154).[2] This money was to be held by

[2] The record on file with the Clerk of this Court consists of one volume. In order to conform to the transcript index, page references to the transcript, referred to herein as "Tr.", are to

petitioner while two Oklahoma mortgage brokers, Rogers and Kelley, sought to obtain mortgage commitments from lending institutions (Tr. 184). If they were successful, the money was to be paid to the lenders as a commitment or "standby" fee, and then Rogers and Kelley were to be paid a fee for their efforts in obtaining the loans (Tr. 188). If they were unsuccessful, the $38,000 was to be returned to the Puerto Rican businessmen, less reasonable expenses (Govt. Ex. 6; R. 451–452, 467).

Shortly after petitioner received the money, it was distributed among Rogers, Kelley and petitioner, with petitioner receiving approximately one-third (Tr. 110–121, 143–145, 188, 194). Rogers and Kelley regarded petitioner as an equal partner, not as their attorney (Tr. 145, 154, 206–207). A few weeks later, the mortgage commitments not having been obtained, the Puerto Rican businessmen sought return of the $38,000 (Tr. 145). Petitioner advised one of them, who was then staying at petitioner's home in Oklahoma, to sue for the return of the money (Tr. 278, 298, 300). On March 30, 1966, suit was filed in the United States District Court for the Western District of Oklahoma and petitioner, as trustee, as well as Rogers and Kelley and their company, were named as defendants (Govt. Ex. 1; R 413–418; Pet. 3–4).

On April 13, 1966, in connection with this civil suit, petitioner was called upon by plaintiff's counsel to

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the original transcript page numbers. Other page references in the record, referred to herein as "R.", use the consecutive pagination adopted when the transcript and other documents were incorporated in the one-volume record.

give a pretrial deposition (Govt. Ex. 6; R. 435–474). After he was sworn before a notary public, he stated that he had received the $38,000, and still retained the money in a safe deposit box, rented in his name, at a designated bank (Tr. 91–93, 95; R. 463). On May 5, 1966, the trial judge enjoined petitioner from making disbursement of the $38,000 which he claimed to be holding. On November 8, 1966, a default judgment was entered after petitioner failed to appear for trial, and he was ordered to pay the $38,000 to the plaintiffs (see Pet. 6).

Upon petitioner's failure to pay the money, a show cause contempt order was served upon him. In January 1967, as part of his response, petitioner filed an affidavit. In it, petitioner asserted that although he had received the $38,000 from Puerto Rico, he had paid that sum, minus $1.50, to Kelley and that at no time after the institution of the civil suit had he held any of the money (Tr. 223–224, Govt. Ex. 14; R. 520–521).[3] At the show cause hearing held late in January 1967, petitioner, who was represented by counsel (G. Ex. 16; R. 522), testified to the effect that he had received the $38,000 and had paid it to Kelley,[4] that

[3] Several months earlier (in October 1966), petitioner had consulted with an attorney, James George, concerning his deposition of April 1966. Mr. George advised petitioner to disclose fully to counsel in the civil suit that the earlier statement was false and himself did so on petitioner's authorization (Pet. App. vi, xxii).

[4] Petitioner obtained an undated receipt from Kelley for $38,000 (Govt. Ex. 13). Kelley testified that the receipt was obtained in September 1966 when he was about to be imprisoned on unrelated charges and after petitioner had indicated he would help Kelley's family during Kelley's absence (Tr. 146–148).

his April 1966 deposition statement that he was holding that sum in a safe deposit box was incorrect, and that he had never held such a sum on deposit and therefore could not transfer the money to the successful civil plaintiffs (Tr. 174–178; see Exhibit 16, R. 522–554). The civil contempt proceeding was then dismissed, and petitioner was subsequently indicted for perjury.

At the perjury trial, petitioner's affidavit of January 1967 and his testimony at the show cause hearing were introduced by the government (Tr. 171–177, 224, 288; see Pet. App. xv–xxii). Petitioner testified that he had acted as attorney for Rogers and Kelley (Tr. 266) and had given Kelley the $38,000 (Tr. 261, 291, 297). He stated that although he knew that the $38,000 was not in his safe deposit box, he had so testified at the deposition because of Kelley's assurance, given that morning, that the $38,000 would be "bank-wired" from Kelley's bank to the bank where petitioner had his safe deposit box (Tr. 281, 302–303).[5]

ARGUMENT

As noted above, the petition is out of time. In any event, it raises no issue of merit.

1. Prior to making their April 1966 depositions, petitioner and Rogers were sworn under the custom-

[5] Kelley, who testified as a government witness, denied telling petitioner he would have his bank transfer the funds (R. 165). Instead, Kelley testified that at the time petitioner gave his April 1966 deposition petitioner had told him: "I have testified I have the 38,000; you take the Fifth Amendment" (Tr. 163). Kelley did, at that time, refuse to testify on a claim of privilege.

ary witness oath by a Mrs. Nona Cline, who was a notary public and court reporter in Oklahoma. When petitioner thereafter failed to respond to the notice that his deposition had been transcribed and was ready for his signature, Mrs. Cline filed the deposition with the clerk of the district court, together with a copy of the unanswered notice that she had previously dispatched to petitioner (Tr. 82–86). Her certificate to the depositions stated that they were taken by her stenographically and after they were reduced to typewritten form, the "signatures thereto * * * were affixed by the witnesses; * * *" (Govt. Ex. 6; R. 484; Pet. App. x-xiii).

Petitioner argues that since he never signed his deposition, having reserved the right to do so (Pet. App. xi), it was error for the reporter to make her certificate and file the deposition with the court. When a deponent refuses to sign, however,—and in the present case the reporter testified to petitioner's failure to respond to notice to do so—a deposition may be used as fully as though signed by the deponent. See *Porter* v. *Seas Shipping Co.,* 20 F.R.D. 108 (S.D.N.Y.); Rule 30(e), F.R. Civ. P.; 4 Moore, *Federal Practice,* pp. 2116–2118 (2d ed. 1968). Between April 1966, when the deposition was taken, and the following November, when the default judgment was entered, petitioner made no objection to either the contents or the form of his deposition. By thus failing to object within a reasonable period of time, petitioner (a party to the civil case) waived any defects in the taking of the deposition. Rule 32(d), F.R. Civ. P. Moreover, the alleged defect in the reporter's cer-

tificate would not, in any event, be a defense to the perjury charge—it did not retroactively confer upon petitioner a license to lie with impunity under oath when his deposition was taken. See *United States* v. *Williams,* 341 U.S. 58, 67–69.

2. Petitioner's statements in his affidavit and at the contempt hearing, made in furtherance of his efforts to prevent his being held in contempt for refusing to turn over the $38,000, were properly admissible against him in the subsequent perjury trial. Petitioner was a practicing attorney, with many years of experience, who was represented by two additional lawyers (see Pet. App. iv); he was obviously familiar with his right to silence. Nonetheless, he freely submitted the affidavit admitting the false statements in the deposition and thereafter similarly testified. See *Black* v. *United States,* 353 F. 2d 885, 889, n. 1 (C.A.D.C.), certiorari denied, 384 U.S. 927, vacated on other grounds, 385 U.S. 26.[6]

Any dilemma confronting petitioner at the contempt hearing was of his own making. His situation is hardly comparable to that of a defendant who in order to establish standing to assert a Fourth Amendment right was required to testify at the suppression hearing, and thus in effect to waive his Fifth Amendment privilege against self-incrimination. Compare *Simmons* v. *United States,* 390 U.S. 377, 389–394.

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[6] The record of the contempt hearing at which petitioner testified (Pet. App. xvii–xxii) belies the claim that the district judge went beyond the bounds of proper inquiry. As the court of appeals pointed out, the record shows only a diligent effort by the court "to bring out all of the material facts" (Pet. App. iv-v).

Here, as the court of appeals pointed out, petitioner's filing of the affidavit and his testimony at the contempt hearing were tactics to avoid liability for contempt (Pet. App. iv). Moreover, it can fairly be said that he was already laying the foundation for a trial defense on a possible perjury or other criminal enarge. His admission that he had knowingly misstated the facts concerning his possession of the $38,000 was explained in his testimony at the contempt hearing as a consequence of his zeal as an attorney and his misplaced reliance upon Kelley. He said that he had in no way been enriched by his false statement. This explanation was repeated at the perjury trial, both in petitioner's testimony and in his counsel's closing argument (Tr. 281, 290, 302, 315–322, 325).

3. Petitioner argues that it was error to exclude the testimony of attorney George concerning his conversations with petitioner in October 1966, and his advice, in which petitioner acquiesced, that opposing counsel in the civil suit be advised that petitioner had made erroneous statements in the April 1966 deposition (Pet. 5, 9–10, 19; see Pet. App. xxxi–xxxv). The exclusion of this evidence could hardly have been prejudicial. If it was meant to show recantation, such evidence would have been irrelevant.

Petitioner's offense was complete when, after the oath was administered, he gave his false testimony. *United States* v. *Norris,* 300 U.S. 564, 574, 576. Since petitioner does not contend that he misunderstood the deposition questions, he could not purge himself by showing a recantation six months later. *United States* v. *Norris, supra.* If, on the other hand, Mr. George's

testimony was meant to show that petitioner was proceeding in good faith and had not intended to falsify, it was self-serving and remote.[7] The trial court did, in fact, permit petitioner to testify fully on the issue of his intent. In these circumstances, the court of appeals correctly ruled that the exclusion of Mr. George's testimony by the district judge was "within the range of his discretion" (Pet. App. vii).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
JEROME M. FEIT,
EDWARD FENIG,
Attorneys.

JUNE 1969.

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[7] Nor was exclusion of the testimony unfair because the government was allowed to introduce evidence of petitioner's testimony at the civil contempt hearing, held during this same period of time (January 1967). The crucial difference is that the government's evidence was material in establishing the falsity of the deposition.

U.S. GOVERNMENT PRINTING OFFICE: 1969